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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

GORDON PENNELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the strong presumption of prejudice from third party contacts with jurors in a criminal case required by Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1959) has been nullified by the decision in Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)?

2. Whether federal district courts have the jurisdiction to immunize necessary defense witnesses who are unavailable as the result of an assertion of a fifth amendment self-incrimination claim, particularly, when the key prosecution witness has been immunized?

3. Whether, and under what circumstances does the defense of impossibility exist in prosecutions under the attempt provisions of Title 21, United States Code, Section 846?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

This is a Petition for Writ of Certiorari brought by Gordon Pennell, seeking a review of the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

This Petition raises several issues which present conflicts among the circuits, and in particular raises a disturbing question concerning the affirmance of a conviction after several members of a jury had been blatantly tampered with, and threatened should they not return a verdict of guilty. The court below, abandoning all prior precedent, affirmed the district court's determination of no prejudice, although that district court determination is at variance with the law of the Sixth Circuit, virtually every circuit to have considered the issue, and the decisions of this court.

OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported at United States v. Pennell, 737 F.2d 521 (6th Cir.

1984). (App. A).

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1984. Rehearing and rehearing en banc were denied July 31, 1984. (App. B). The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> "... nor shall any person ... be deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the

right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 21, United States Code, Section 841(a)(1) provides:

...

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

Title 21, United States Code, Section 846 provides:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.)

STATEMENT OF THE CASE

THE STING

Petitioner, Gordon Pennell, a florist in Lavonia, Michigan, reported to his local police, the Lavonia Police Department, in July, 1980, that he suspected drug activity was occurring at his floral shop, and offered to cooperate with the authorities to eradicate the problem. Through a series of bizarre twists, this act of public awareness led to the petitioner being ensnared by an insidious Government "reverse sting" operation.

Pennell, in July, 1980, was referred by the local authorities to Drug Enforcement Administration Agent Frank Catalogna. Through mid-August, 1980, Pennell relayed information concerning suspected narcotics trafficking to the authorities.

In early October, 1980, petitioner's life was threatened as a result of the information he had conveyed to the Lavonia Police Department and the D.E.A. Pennell accused the agencies of having leaked the fact of his cooperation to associates of the drug dealers on whom he had informed.

In March, 1981, Agent Catalogna, who claimed suspicion of Pennell's motives, was informed by a confidential informant that Pennell was desirous of purchasing a quantity of cocaine. With the consent of the Michigan agents, the informant provided Pennell with the name and telephone number of an undercover Florida D.E.A. agent posing as a major drug supplier.

Pennell, on April 21, 1981, contacted the undercover agent and discussed a drug deal. Shortly thereafter Pennell informed Agent Catalogna of the contact and that he

had located a major cocaine supplier.

Agent Catalogna lied that he was about to go on vacation and told Pennell they would speak in a week.

The undercover agent completed negotiations with Pennell and ultimately supplied a quantity of bogus cocaine. Pennell was arrested and charged with conspiring to possess and distribute cocaine (21 U.S.C. Sec. 846), attempt to possess and distribute cocaine (21 U.S.C. Sec. 846) and various substantive counts.

TRIAL

Petitioner's first trial ended in a mistrial, when a juror improperly received prejudicial information concerning the case from a third party. Petitioner's second trial should have met a similar fate, but did not.

The primary witness at both trials was the confidential informant whose testimony was obtained under a grant of statutory immunity. According to the informant, Pennell initiated the contact regarding the cocaine transaction, a fact which if believed, would demonstrate pre-disposition and negate the entrapment defense. United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973).

Pennell, in an effort to rebut this evidence, and to establish that the initial contacts between Pennell and the informant were unrelated to narcotics, attempted to introduce the testimony of Charles Massad, a drug dealer who had been associated with the informant.[1/]

1/ An offer of proof was made to the district court, which is summarized as follows: Mr. Massad was involved with the informant during the entire relevant period and could (cont.)

Massad, when called by Pennell, asserted his fifth amendment right against self incrimination, and refused to testify. Pennell sought an order of immunity for Massad, which was refused. As a result, the testimony was not presented to the jury.

DELIBERATIONS

In the very early hours of a Sunday morning, during a break in the jury deliberations in this case, five jurors were

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1/ (cont.)

testify that the informant was dealing in large quantities of cocaine from a number of suppliers during the period of his cooperation with the D.E.A. The informant was also using large amounts of cocaine for personal consumption. Mr. Massad would testify that the informant approached petitioner to request petitioner's assistance in straightening out certain financial obligations. Mr. Massad could testify that, to his knowledge, petitioner's only association with the informant was to resolve financial obligations and that he never observed petitioner become involved in any narcotics transactions with the informant.

contacted and told, in essence, that they must return a verdict of guilty or they would be "sorry." The next morning, the five jurors who had been contacted notified the court of the incident, and discussed the telephone calls with other members of the jury. The foreman, in a note to the court, asked whether the jury was expected to continue its deliberations, clearly evidencing the concern of all jurors with further deliberation.

The court examined each of the five jurors individually. Although none indicated an inability to continue deliberations, two indicated that a juror who had not been contacted had expressed a concern that she might not be able to continue. This juror, a Ms. Saveski, stated to the court directly, however, that she could continue.

After the jury returned to deliberations, a subsequent note indicated that still another juror had expressed an inability to continue in light of the threatening phone calls. This juror, Ms. Lorenz, stated she was "nervous" and offered to continue deliberation "with some assurance that nothing would happen." Ms. Lorenz was sent back to deliberations, although obviously no such assurances were given.

Later the same day, the court received an additional communication indicating that the jury was still concerned about the phone calls and was having difficulty in deliberations. Various defense motions for mistrial and a motion for new trial on this ground were denied.

REASONS FOR GRANTING THE WRIT

I

THE SIXTH CIRCUIT OPINION, WHICH COUNTENANCED THREATS MADE TO THE JURORS IN THIS CASE, DISREGARDED THE OPINION OF THIS COURT IN REMMMER V. UNITED STATES, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), IGNORED DIRECTLY APPLICABLE PRECEDENT IN ITS OWN CIRCUIT, AND CONFLICTS WITH THE OPINION OF VIRTUALLY EVERY CIRCUIT TO HAVE CONSIDERED THE APPROPRIATE PROCEDURES TO BE USED ON A TAMPERED JURY IN A CRIMINAL CASE.

The jury[2/] in this case was threatened,[3/] anonymously, during deliberations to return a verdict of guilty. This blatant, prejudicial tampering admittedly intimidated

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2/ As indicated above, five jurors' houses were contacted directly. All jurors were aware of the calls.

3/ Such contacts are recognized as threats, United States v. Brown, 571 F.2d 980, 987 (6th Cir. 1978).

several jurors, but was countenanced by the trial court and the court of appeals.

In affirming the conviction over a strong dissent by Judge Celebrezze, the court below disregarded the pronouncements of this court in Remmer v. United States, supra, ignored directly applicable precedent in its own circuit, and rendered an opinion which is in direct conflict with virtually every federal circuit to consider the issue.

The reported opinion of the Sixth Circuit stands, furthermore, as a blatant misinterpretation of this court's opinion in Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), a case which, itself, was met with a thoughtful dissent by three justices (Justices Marshall, Brennan, and Stevens) and a limited concurrence by a fourth (Justice O'Connor).

Properly considered, Remmer governs this case. The majority opinion below acknowledged that "were Remmer. . . controlling, we would be hard pressed to affirm Pennell's conviction." 737 F.2d at 532. Remmer requires not only that a hearing be held in appropriate cases of jury tampering or misconduct, but that a strong presumption of prejudice be applied at such a hearing. In this case, "there is no evidence in the record to suggest that the trial court applied [such a] presumption." 737 F.2d 538, 540 (Celebrezze, J. dissenting).

The majority disregarded the mandate of Remmer through a tortured and illogical application of Phillips. For, while Phillips found no presumption of prejudice to exist on the facts before it, the Sixth Circuit opinion concluded in direct conflict with

Remmer, that Phillips held that a presumption of prejudice was not to be applied at all.

Specifically, the majority below concluded that Phillips held that Remmer "does not govern the question of burden of proof where potential jury partiality is alleged," 737 F.2d 532. It found further that while "Remmer placed a heavy burden of proof upon the government. . . Phillips worked a substantial change in the law" by transferring that burden to the defendant. Ibid. n.10. Phillips, of course, did nothing of the sort. Phillips simply found no irrebutable presumption applicable, and left undisturbed the heavy presumption of prejudice to be overcome by the government. While the ultimate burden of proof still rests with the defendant, he is assisted, under both Remmer and Phillips, by the

presumption. Contrary to the conclusion below that "prejudice is not to be presumed," the presumption is a vital and integral part of a Remmer-Phillips hearing.

Nothing in the majority, concurring or dissenting opinions in Phillips supports the Sixth Circuit interpretation of that case. Phillips, in fact, relied heavily on Remmer, the very case which the court below found to be overruled by Phillips.

Virtually every circuit to have considered the issue is in conflict with the decision of the Sixth Circuit in this case. Each such circuit has found that a presumption of prejudice exists in any irregular contact with the jurors, and that a heavy burden is imposed on the prosecution to show that there is no prejudice. United States v. Flaherty, 668 F.2d 566, 601-02

(1st Cir. 1981); United States v. Bufalino, 576 F.2d 446 (2nd Cir.) cert. den., 439 U.S. 928, 99 S.Ct. 314, 58 L.Ed.2d 321 (1978); United States v. Taylor, 562 F.2d 1345, 1365 (2nd Cir.) cert. den., 432 U.S. 909, 97 S.Ct. 2958, 53 L.Ed.2d 1083 (1977); United States v. Buscia, 573 F.2d 827 (3d Cir.) cert. den., 435 U.S. 911, 98 S.Ct. 2248, 56 L.Ed.2d 411 (1978); United States, v. Forrest, 620 F.2d 446 (5th Cir. 1980); United States v. Jones, 597 F.2d 485 (5th Cir. 1979), cert. den., 444 U.S. 1043, 100 S.Ct. 729, 62 L.Ed.2d 728 (1980); Owen v. Duckworth, 727 F.2d 643, 646 (7th Cir. 1984); United States v. Treatman, 524 F.2d 320, 323 (8th Cir. 1975); Polizzi v. United States, 550 F.2d 1133, 1138 (9th Cir. 1976); United States v. Greer, 620 F.2d 1383, 1385 (10th Cir. 1980).

Indeed, the court below recognized that its decision was contrary to the strict standard of presumptive prejudice applied even in the Sixth Circuit. 737 F.2d 521, 531. See Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), cert. den., 435 U.S. 924, 98 S.Ct. 1488, 55 L.Ed.2d 517 (1978); United States v. Reynolds, 489 F.2d 4, 8 (6th Cir. 1973), cert. den., 416 U.S. 989, 94 S.Ct. 2395, 40 L.Ed.2d 766 (1974); Stone v. United States, 113 F.2d 70 (6th Cir. 1940).

Several of the cases cited above were decided after this court's decision in Phillips, notably Owen v. Duckworth, supra, a post-Phillips case which specifically discusses the Phillips rationale, and yet, in contrast to the decision below, finds that the prosecution bears a heavy burden to dispel the presumption of prejudice

from an unwarranted jury contact.[4/]

This Court has recently had occasion to decide, in summary fashion, and not without dissention, a limited aspect of this issue. Several courts had recognized that an ex parte communication between the judge and the jury was presumptively prejudicial. See United Sttes v. Taylor, supra, United States v. Treatman, supra. In Rushen v. Spain, ___ U.S. ___, 104 S.Ct. 453 (1983), the court, in a per curiam summary reversal of the affirmance of the granting of a habeas corpus petition, concluded that such ex parte contacts were not necessarily prejudicial. While the summary nature of the disposition disturbed several justices, a review of the concurring and dissenting opinions indicates the contrary streams of thought with regard to

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4/ Id. at 646.

the jury contact issue. The existence of the reported decision below serves to further confuse this area.

In view of the threatening nature of the anonymous calls, and the obvious concerns of the jurors, the jurors' volunteered statements of concern, and the highly equivocal response of some of the jurors on the issue of their impartiality, the proper application of the strong presumption mandated by Remmer would have been decisive - a fact acknowledged by the court below.

This case, therefore, is an appropriate one to resolve the present conflict among the circuits concerning the applicability of a presumption of prejudice to jury tampering hearings. The issue itself is clearly an important one which goes to the heart of the Constitution's guarantee

of a fair trial, and the accuracy of the fact-finding purpose of such a trial.

II

THE QUESTION OF THE AUTHORITY OF FEDERAL DISTRICT COURTS TO IMMUNIZE POTENTIAL DEFENSE WITNESSES HAS SPLIT THE CIRCUITS, AND PANELS WITHIN VARIOUS CIRCUITS, THEREBY CREATING SUBSTANTIALLY DISPARATE TREATMENT OF THE FIFTH AND SIXTH AMENDMENT RIGHTS OF CRIMINAL DEFENDANTS.

Although the Government immunized its key witness against the petitioner to obtain his testimony, Pennell was precluded from rebutting this testimony because a proposed defense witness asserted his Fifth amendment claim against self-incrimination. The trial court refused to grant immunity to petitioner's witness, although a detailed offer of proof regarding this testimony was made. The court below

specifically held that federal courts do not "have inherent power to immunize witnesses." 737 F.2d at 527.

This issue is one which continues to divide the circuits,[5/] has produced contrary

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[5/] The Third Circuit has taken the lead in recognizing the availability of judicial immunity either in cases of deliberate distortion of the fact-finding process by the government, or under the theory of the inherent authority of the court. Government of the Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Herman, 589 F.2d 1191 (3d Cir.) cert. den., 441 U.S. 913, 99 S.Ct. 2014, 60 L.Ed.2d 386 (1978). The Third Circuit rule was approved by the Ninth Circuit in United States v. Lord, 711 F.2d 887, 891 (9th Cir. 1983), but see United States v. Brutzman, 731 F.2d 1449, 1452 (9th Cir. 1984). The Seventh Circuit, in dicta, indicated that sanctions may be imposed against a prosecution which refuses to immunize defense witnesses. United States v. Allstate Mortgage Corporation, 507 F.2d 492, 495 (7th Cir. 1974), cert. den., 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975). But see United States v. Bounos, 693 F.2d 38 (7th Cir. 1982).

The Second Circuit has adopted strict rules for the use of such immunity, and has indicated that it has "not been receptive to the idea." United States v. Bowe, 698 F.2d 560, 565, n.5 (2d Cir. 1983).

(cont.)

decisions within the same circuit,[6/] and has generated substantial commentary.[7/]

5/ (cont.)

See also United States v. Burns, 684 F.2d 1066 (2d Cir. 1982); United States v. Calvente, 722 F.2d 1019, 1025 (2d Cir. 1983).

Several Circuits have held that the court is without jurisdiction to immunize witnesses:

Fourth (United States v. Klauber, 611 F.2d 512, 517-20 (4th Cir. 1979) cert. den., 446 U.S. 908, 100 S.Ct. 1835, 64 L.Ed.2d 261 (1980));

Fifth (United States v. Heffington, 682 F.2d 1075, 1080-81 (5th Cir. 1982), cert. den. sub nom., Giella v. United States, ___ U.S. ___, 103 S.Ct. 734 (1983); United States v. Thevis, 665 F.2d 616, 639 (5th Cir.), cert. den., 459 U.S. 825, 103 S.Ct. 57 (1982); United States v. Herbst, 641 F.2d 1161 (5th Cir. 1981) cert. den., 454 U.S. 841, 102 S.Ct. 292, 70 L.Ed. 141 (1981); United States v. Chagra, 669 F.2d 241, 259-60 (5th Cir. 1982));

Eleventh (United States v. Gottesman, 724 F.2d 1517, 1524 (11th Cir. 1984)); and

District of Columbia Circuits (Earl v. United States, 361 F.2d 531, 534-535 (D.C. Cir. 1966)).

(cont.)

6/ and 7/ (see page 24)

It is an issue which implicates basic fifth amendment due process and sixth amendment compulsory process claims on the one hand, and separation of powers issues on the other. Left unresolved, this issue threatens to work substantial injustice to defendants unable to present necessary exculpatory evidence, will lead to substantially different treatment of defendants depending on the jurisdiction

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5/ The Eighth Circuit, in United States v. Hardrich, 707 F.2d 992, 994 (8th Cir. 1983) found it was "doubtful that a district judge may order 'judicial immunity' for a reluctant witness in this circuit."

6/ Compare United States v. Bounos, 693 F.2d 38 (7th Cir. 1982) with United States v. Allstate Mortgage Corp., supra; United States v. Lord, 711 F.2d 887, 891 (9th Cir. 1983) with United States v. Brutzman, 731 F.2d 1449, 1452 (9th Cir. 1984).

7/ See, e.g., Note, The Right to Have Use Immunity Granted to Defense Witnesses, 91 Harv.L.Rev. 1266 (1978); Note, Witness for the Defense: a Right to Immunity, 34 Vand. L.Rev. 1665 (1981).

in which they are charged, and will impinge directly on the truth-finding process of criminal trials.

The theory of judicial power to immunize witnesses finds a dual basis. First, the due process clause should prevent Government overreaching such as in this case, in which evidence on one side of the issue - the Government's side - is presented to the jury through a statutory immunity grant, while evidence on the other is withheld, because the defendant is not in the same position as the Government to compel testimony over fifth amendment objections.

Second, the sixth amendment right to compulsory process is nullified if material defense evidence becomes completely unavailable because of the assertion of a self-incrimination claim by the witness.

Under either rubric, the effect is the same, a defendant is unfairly tried by a jury that is factually misled.

This state of affairs has led several circuits to conclude that, potentially, two forms of immunity are available. Thus, if the Government uses its immunity powers in a deliberate and intentional distortion of the judicial fact-finding process, it has been held that immunity for defense witnesses would be appropriate. See, for example, Government of the Virgin Islands v. Smith, supra, 615 F.2d 964, 968; United States v. Herman, supra. Furthermore, several cases have held that the court has inherent authority to grant judicial immunity when the privileged testimony is essential to an effective defense. Id.

The question has been before the court on previous occasions (see, e.g., Autry v. McKaskle, ___ U.S. ___, 104 S.Ct. 1458, 1459 (Marshall and Brennan dissenting from denial of certiorari (1984)), but has not been decided by it. This case is a highly appropriate vehicle for resolving this issue, inasmuch as a review of the entire record is unnecessary, and the proposed testimony of the excluded witness has been preserved in a succinct offer of proof.

Additionally, the unique facts of this case, in which the petitioner asserted he was acting in aid of law enforcement, made a conviction dependent on the informant's credibility, and his unrebutted, but uncorroborated, story of prior drug dealings with the petitioner. Had this case been tried under the Third or Ninth Circuit

Rules, the withheld testimony would have been admitted, and the petitioner likely would have been acquitted.

The importance of the issue, as noted above, transcends this case, and demands resolution by this court.

III

THE PROPRIETY OF A CONVICTION FOR ATTEMPT TO POSSESS WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE UNDER 21 U.S.C. SEC. 846 HAS BEEN THE SUBJECT OF DISSENSION IN THE VARIOUS CIRCUITS, AND THREATENS THE LEGITIMACY OF THE PRESENT FEDERAL POLICY CONCERNING "REVERSE STING" OPERATIONS.

The federal government maintains a policy in "reverse sting" cases, that is undercover operations in which the government agents pose as sellers of narcotics, of not providing actual narcotics. There is, at present, serious conflict in the

circuits regarding the ability to prosecute successful "reverse sting" cases as attempts under 21 U.S.C. Sec. 846. This conflict also implicates the age-old controversy over the defense of impossibility, and threatens a notion basic to the American system of justice, that a person cannot be prosecuted for his thoughts or intentions.

The court below adopted the analysis of the Third Circuit in United States v. Everett, 700 F.2d 900 (3d Cir. 1983) to the effect that Congress intended to eliminate the impossibility defense in cases prosecuted under 21 U.S.C. Sections 841(a)(1) and 846. 737 F.2d 521, 525. Although the accuracy of statutory interpretations performed by Everett is in question, this case presents a subsidiary issue of the standards to be used in

determining whether a substantive crime of intent has been committed. Each of these issues is appropriate for review by this court.

STATUTORY INTERPRETATION OF 21 U.S.C. SECTIONS 841 and 846.

Everett undertook an analysis of the intent of Congress in enacting the Comprehensive Drug Abuse Prevention and Control Act, and concluded that Congress intended to eliminate the defens of impossibility when it enacted Section 846. 700 F.2d 900, 904. The court below completely adopted the facially invalid analysis made in Everett.

The starting point in such a review is a recognition that no federal statute contains a comprehensive definition of attempt. United States v. Rivera-Sola, 713 F.2d 866, 869 (1st Cir. 1983); United States

v. Jackson, 560 F.2d 112, 116 (2d Cir.), cert. den., 434 U.S. 941, ___ S.Ct. ___, ___ L.Ed.2d ___ (1977). Consequently, the common law definition of attempt, including its recognition of impossibility as a defense, would apply unless some contrary intent could be divined. Two facts relied upon in Everett to interpret Congress' intent actually argue against Everett's conclusion.

First, Congress has considered and rejected a generally applicable attempt statute which would have removed impossibility as a defense. See Final Report of National Commission on Reform of the Federal Criminal Law, Sec. 1001(1) (1971); see, I Working Papers of the National Commission on Reform of the Federal Criminal Laws, 360 (1970).

Consequently, Congress had before it, and refused to enact, legislation which would have eliminated impossibility, in general, as a defense.

In addition, however, the history of Section 846, as restated in Everett simply does not support the conclusion that Congress eliminated the defense of impossibility in Section 846.

The Senate version of the bill substituted the word "endeavor" for "attempt" for the stated purpose of eliminating the impossibility defense. S. 3246, 91st Cong., 2d Sess, Sec. 504 (1970); 700 F.2d 905-906. The House eventually passed the Senate-backed bill using the same language. H.R. 17463, 91st Cong., 2d Sess. Sec. 504 (1970). After hearings, the new bill was introduced which used the language "attempt" rather than "endeavor." H.R. 18583, 91st Cong.,

2d Sess., Tit.I (1970).

Rationally, the use of the word "attempt" should be interpreted to imply that the new bill intended to include the impossibility defense which had been subsumed within the attempt language. Everett, however, interprets the course of events as indicating a clear intent by Congress to remove the impossibility defense, a conclusion which is not justified by the facts, nor consistent with the rule of statutory construction that ambiguity concerning the ambit of a criminal statute must be resolved in favor of lenity. Simpson v. United States, 435 U.S. 6, 14, 98 S.Ct. 909, 913, 55 L.Ed.2d 70 (1978).

Had Congress intended to eliminate the defense of impossibility, it could have, and it was required to do so, unambiguously. The interpretation made by

Everett, and adopted by the Sixth Circuit below runs afoul of common statutory analysis, and should be clarified by this court.

CONFLICT IN THE CIRCUITS EXISTS WITH REGARD TO ANALYSIS OF ATTEMPT PROVISIONS.

Clearly, had the impossibility defense survived the Everett analysis, the petitioner in this case could not have been found guilty of attempted possession of narcotics when no narcotics were involved. Even if the defense of impossibility, as such, does not exist, chargings such as that involved in this case necessarily drag appellate courts through a morass of conflicting, contradictory, and largely indecipherable analyses.

Both Everett and United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976) recognize that in attempt cases a substantial

danger exists that a prosecution may be based solely upon the defendant's intent. Oviedo makes the analysis in the terms of the impossibility defense and to that degree is directly contrary to Everett and the opinion below which reject completely the impossibility analysis. Oviedo points out, moreover, that at least three analyses of attempt provisions have been made.

The first is exemplified by the decision in United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973). The Berrigan court drew a strict distinction between the intent to perform the act and the performance of the act on one hand, and whether the completed conduct constituted a crime on the other. Absent the commission of an ultimate crime, Berrigan would preclude a conviction. At the other extreme

United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y. 1973) affirmed, 484 F.2d 1271 (2d Cir. 1973), examines the objective of the defendants, i.e., their intent, and authorizes a conviction in any case in which intent to commit the crime exists.

The Oviedo court found difficulty with both analyses. Berrigan would eliminate the distinction between factual and legal impossibility; while Roman would justify prosecution based upon mens rea alone. Oviedo, therefore, took the third, or middle, ground, and permitted prosecution only in those cases in which the objective acts of the defendant, "without any reliance on the accompanying mens rea, marked the defendant's conduct as criminal in nature." 525 F.2d 881, 885.

Consequently, under Berrigan no attempt was committed by Pennell. Similarly, as a result of the unique facts of this case in which Pennell claimed to be acting in aid of law enforcement and without criminal intent, his ambiguous conduct could not corroborate his mens rea, within the meaning of Oviedo and Everett. And, finally, under Roman, Pennell did not exhibit the requisite mens rea, if indeed he was assisting law enforcement, but corroboration of his intent with his conduct would be unnecessary.

The confusion in this area is one which will floruish and persist without guidance from this court. Review should, therefore, be granted.

CONCLUSION

For the reasons cited above, it is respectfully submitted that this case is one which presents a series of important, substantial issues which have plagued the federal system and which require immediate resolution by way of granting the instant Petition.

Respectfully submitted,

WEITZMAN & RE
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